88-1580

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

DEL PERCIO, INC., et al.,

Petitioners,

v.

CITY OF DAYTONA BEACH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is an adult entertainment zoning ordinance which has the effect of suppressing, or greatly restricting access to, lawful speech, and which virtually eliminates adult entertainment businesses from a city, an unlawful restriction of activities protected by the First Amendment, as held in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)?

2. Is an adult entertainment zoning ordinance which requires governmental permission to open and operate an adult business, and which contains language so vague as to allow a government official the power to grant or deny permission in the exercise of unfettered discretion, an unlawful restriction on activities protected by the First Amendment, as held in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1958)?

LIST OF PARTIES

There are three Petitioners in this case, each of them a Florida corporation: DEL PERCIO, INC., PINK PUSSYCAT, INC. and FUNCTION JUNCTION, INC.

There is one Respondent: the CITY OF DAYTONA BEACH, a Florida municipal corporation.

There are no entities to report or list pursuant to this Court's Rule 28.1.

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OPINIONS BELOW

The unreported opinion of the United States District Court for the Middle District of Florida is reprinted in Appendix A. The order of the District Court modifying the Findings of Fact is reprinted in Appendix B. The unreported opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted in Appendix C.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on December 16, 1988. On March 16, 1989 Mr. Justice Anthony M. Kennedy entered an Order extending the time in which to file a petition for writ of certiorari through March 26, 1989. This petition is filed within that extension period. The opinion of the Court of Appeals, upholding the final judgment of the District Court, constitutes a final judgment in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech . . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS OF DAYTONA BEACH CODE

The applicable provisions of the Daytona Beach Municipal Code are included in the opinion of the District Court, as reprinted in Appendix A.

STATEMENT OF THE CASE

There are two reasons why this Court should review this case. The courts below authorized any municipality in the Eleventh Circuit, including one which allows virtually all other forms of entertainment, to effectively eliminate sexually oriented non-obscene entertainment through highly restrictive zoning aimed at adult entertainment. The courts also gave approval to the use of extremely vague language in an ordinance which requires government permission before operating an adult entertainment business, so that a government official may exercise completely unbridled discretion in denying permission for such entertainment. On both points, the courts below are in direct conflict with overwhelming case law, including several decisions of this Court.

The City of Daytona Beach, on Florida's east central coast, occupies approximately 31.5 square miles (about 20,160 acres) and has an approximate population of 59,000. The City has an average mix of residential, commercial and industrial

uses, and entertainment plays a large role in the City's economy.[1]

Petitioners have been operators of three adult nightclubs in the city.[2] Each of their businesses was in continuous operation at its same location prior to the enactment of an extremely restrictive zoning ordinance in September, 1981. The ordinance, which banned adult businesses from more than 99.84% of the City, defined adult nightclubs as "adult theaters," and imposed zoning and distance restrictions on them. A provision in the ordinance allowed any adult business which was in operation at the time of its enactment to continue presenting adult entertainment until January 1, 1992.

In October, 1981 the City enacted a second ordinance, prohibiting nude dancing in places where alcoholic beverages are present. Petitioners challenged that ordinance in numerous court cases, and during a significant period of time were compelled to clothe their entertainers to avoid arrests while court cases were pending. Finally, in August of 1985, the

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1 In addition to hundreds of alcoholic beverage licenses for restaurants and lounges, the City is home to the Daytona International Speedway, site of world-famous stock car races, and a major new convention center, where nationally known entertainment acts present concerts. The City also hosts "Spring Break," traditional vacation time for nearly half a million college students from throughout the nation, and "Bike Week," an annual meeting of motorcycle clubs. Indeed, the City not only welcomes these entertainment extravaganzas, it courts and encourages them.

2 In this Petition, the term "adult nightclub" refers to a commercial establishment presenting nonobscene topless dancing by female performers as entertainment. The City includes such a business in its definition of an adult theater.

ordinance was upheld by the Florida Supreme Court in *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985). At that time, Petitioners attempted to terminate alcoholic beverage sales in order to resume the presentation of nude entertainment; however, they were prevented from doing so by the City. The City took the position that when the nightclubs clothed their dancers to avoid arrests during the aforementioned court cases, they waived their nonconforming use status and would be in violation of the zoning ordinance if they presented any adult entertainment.

Thus, the zoning ordinance prohibits the Petitioners from presenting adult entertainment at their present locations, in spite of the fact that they were presenting the very same entertainment at those locations for many years prior to the enactment of the ordinance. At time of trial, there were only two or three adult businesses in the entire City of Daytona Beach (all nonconforming uses), and not a single adult nightclub. As a result of the ordinance, there will not be a single adult business in the City as of January 1, 1992.[3]

On February 3, 1986 Petitioners filed a Complaint, under 42 U.S.C. sec 1983, in the United States District Court

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[3] When the ordinance was passed, there were twenty adult businesses in Daytona Beach. By trial that number had been reduced to two or three, which must close by January 1, 1992. Thus, by 1992 the City will have eliminated 100% of its pre-existing adult businesses. In a City which welcomes virtually all other entertainment with open arms (including an annual gathering of thousands of "Hell's Angels" motorcyclists), nonobscene adult entertainment is being totally eliminated.

for the Middle District of Florida. The Complaint sought a judgement declaring that the ordinance was unconstitutional under the First Amendment, and an injunction permanently forbidding its enforcement against Petitioners.

On June 19, 1987 the case was heard before District Court Judge G. Kendall Sharp. There was no quarrel as to the percentage of land available for adult businesses in Daytona Beach. The parties stipulated that the ordinance prohibits any adult business in over 99.84% of the City of Daytona Beach; out of more than 20,000 acres in the City, only 32 acres were left available for such businesses. Applying the distance restrictions in the ordinance, the court found that there is an absolute maximum of eight locations in the entire City.[4]

There was also no dispute at trial as to the vagueness of the ordinance. That was established quite clearly with the testimony of Fred Holmes, Deputy Building Official for Daytona Beach. The following statements of Mr. Holmes demonstrate the amount of discretion a building official has in deciding whether to allow or disallow an adult business at a particular location:

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4 There are only eight locations if the City if very generous in construing its own ordinance. Given a history of vigorous opposition to adult entertainment by the government and police of Daytona Beach, and a strong effort to drive these businesses out of existence, it would be somewhat naive to believe that the City would give adult entertainment businesses the benefit of a favorable construction.

Q. Mr. Holmes, are you familiar with the provisions of this ordinance concerning the distance provisions?

A. Yes.

Q. And are you familiar with the provision which requires you not to be where large numbers of minors travel or congregate?

A. Yes.

Q. Now, as I understand it, you testified that that would not include a convenience store?

A. That would not include a convenience store.

Q. All right. Then your testimony would be that a convenience store which regularly had large numbers of minors congregating there and/or traveling to and from there would not be included within the scope of that definition, is that correct?

A. A convenience store is not a place of assembly.

Q. Is it not a public or semi-public place of assembly?

A. No.

Q. Are you saying that your understanding of this ordinance means only certain types of public places of assembly.

A. Yes.

Q. What types?

A. Anytime you have congregated fifty or more persons.

This definition is not in the ordinance. In fact, Mr. Holmes decided on his own to use the number "fifty" in his personal definition of place of assembly because of a definition he found in a totally different ordinance, the Daytona Beach Life Safety Code! That ordinance, as Holmes testified, sets requirements for emergency exits in buildings. As Holmes further testified, any other building official enforcing the adult entertainment ordinance could use any other number he felt appropriate:

Q. There's nothing in [sec. 51.2.4], however, that says you have to use the Life Safety Code in deciding what a large number is, is there?

A. Nothing that dictates them to use that, no.

Q. And you used it because you felt it was appropriate?

A. Yes.

Q. And the next Mr. Holmes might feel it would not be appropriate, is that correct?

A. We went through that, yes.

Thus, what is meant by "public or semi-public place of assembly where large numbers of minors regularly travel or

congregate" is left to the judgment of a building official. That judgment amounts to unfettered discretion.

More of Holmes' testimony illustrates how discretionary the language is:

> Q. How about restaurants? You talked about fast food restaurants, is that right?
>
> A. [Yes].
>
> Q. You mean like McDonalds and Burger King and places like that?
>
> A. They are restaurants and *they are places of assembly*, yes.
>
> Q. Is that what you called fast food restaurants?
>
> A. Yes.
>
> Q. In fact, did you identify one of the locations here as including a fast food restaurant?
>
> A. [Yes].[5]
>
> Q. What if you had on a regular basis, like every day after school, every weekend after every football game, in excess of fifty minors in and around that fast food restaurant?

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5 Holmes also said there was a Burger King right in the middle of one of the eight locations. However, on the day he determined there were eight locations he arbitrarily decided that the Burger King was not a place where large numbers of minors congregate <u>because it serves food!</u>

A. We would have to take a good hard look at it.

Q. But would it be a place where large numbers of minors regularly travel or congregate?

A. No, I don't think so.

Q. And why not?

A. Because the principal use is the serving of food.

Thus, not only does the building official have the authority to determine how many minors constitute a large number, he can also decide that issue *depending on the use of the building!* This evidence, presented by the City through its own building official -- the person charged with responsibility for enforcing the ordinance -- clearly shows how much unlawful discretion the ordinance contains. Whether a particular site is available for an adult business depends on which building official happens to consider the situation:

Q. I hand you a document that is identified [sic] Article Three, Definition of Words, Ordinance 51.2, Location, 51.2.4, ask you to read that as the specific provision that we're discussing right now.

A. Okay.

Q. Have you read it, sir?

A. Yes, sir.

Q. All right. Can you tell me where it says in there that that would exclude a restaurant because its primary business is serving food?

A. No, it doesn't exclude it.

Q. Can you tell me where it says in there that fifty constitutes a large number of minors?

A. Not in that ordinance, no.

Q. Can vou tell me where in this ordinance it references any other ordinance in the City of Daytona Beach to tell us what large number of minors means?

A. No.

Q. Can you tell me where in this ordinance it references any other ordinance in the City of Daytona Beach which provides this restaurant exception that you're talking about.

A. No.

Q. Can you tell me where in this ordinance it gives you the standards to determine what is meant by the phrase large number of minors?

A. Yes.

Q. Tell me.

A. It's in the preamble to the ordinance, the zoning ordinance, and that gives the chief building official *the right to interpret and enforce the zoning ordinance.*

Q. Interpret and enforce.

A. Yes.

Q. Now, Mr. Holmes, if you became mayor tomorrow and a new building official took your place, this ordinance allows him, does it not, to decide that one hundred and fifty is a large number?

A. I would think that he would have that option with reservations, yes.

Q. . . . And would this new Fred Holmes also have the authority to . . . construe this ordinance to mean twenty-five is a large number, correct?

A. Correct.

Q. And couldn't he also say "[C]ontrary to my predecessor, the learned Fred Holmes, I believe that a fast food restaurant is a place where large numbers of minors travel or congregate," correct?

A. I don't think so.

Q. Well, how would he be prevented, sir, by the terms of this ordinance?

A. A store is not a standard place of assembly. It's a retail outlet.

Q. Large numbers of the public assemble at places which are retail outlets, do they not?

A. The convenience stores are generally not large enough to house that number of people. However, you may be right, the Chief Building

Official could make a determination that would be contrary to my thinking.

Q. In effect, then, Mr. Holmes, aren't you saying that the determination of what constitutes a large number of minors and a determination of where they regularly travel or congregate is pretty much up to whoever is enforcing the Code at that time?

A. I don't know. He still has guidelines to go by.

Q. Does he not have great discretion in applying those guidelines?

A. I think so, yes.

Even the definition of adult theater in the zoning ordinance leaves it up to the individual building official to determine which businesses are included. Holmes was asked if the presentation of nude dancing in and of itself would constitute adult entertainment:

Q. Would it matter to your office if the totally nude entertainment was not harmful to minors?

A. I don't know what harmful to minors would be. I'm not an expert in that field.[6]

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6 Another principal City witness -- Gerald Langston -- agreed that the phrases challenged herein were subjective. And this witness was qualified as an expert in urban planning by the trial court.

Q. In fact, Mr. Holmes, is it not your opinion that any exposure of the female breast is activity which is harmful to minors?

A. No.

Q. Is any exposure of the human female breast in connection with a stage performance adult entertainment?

A. Yes.[7]

On December 17, 1987 the trial court entered judgment for the City and dismissed the case. The court made no finding as to whether the ordinance had the effect of suppressing or greatly restricting access to lawful speech or whether the ordinance effectively denied Petitioners a reasonable opportunity to open and operate an adult nightclub.

On December 16, 1988 the United States Court of Appeals for the Eleventh Circuit entered its opinion affirming the trial court's decision, *per curiam*.

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7 All emphasis in Holmes' testimony has been added by the author.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW, UPHOLDING AN ORDINANCE WHICH VIRTUALLY ELIMINATES SEXUALLY EXPLICIT NON-OBSCENE ENTERTAINMENT FROM THE CITY OF DAYTONA BEACH, IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND SEVERAL COURTS OF APPEALS.

In 1976, this Court handed down the first of three important decisions defining the power of local governments to zone adult businesses. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court upheld a Detroit ordinance adding adult theaters and bookstores to a list of other regulated uses which were prohibited from concentrating together. 427 U.S. at 53-54. Of significant importance to the Court's decision in the case was the fact that the ordinance did not limit in any significant way the number of available locations for adult businesses in Detroit. Otherwise, as the Court noted, the ordinance might not have been upheld:

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "[t]he Ordinances do not affect the operation of existing establishments but only the

> location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." 373 F.Supp., at 370.
>
> *Id.* at 71, n. 35.

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), the Court struck down a zoning ordinance which had prohibited live nude dancing throughout the Borough. Rejecting the Borough's argument that its ordinance was valid under *American Mini Theatres*, the Court said:

> As an initial matter, this case is not controlled by *Young v. American Mini Theatres, Inc.* . . . . Although the Court there stated that a zoning ordinance is not invalid merely because it regulates activity protected under the First Amendment, it emphasized that the challenged restriction on the location of adult movie theaters imposed a minimal burden on protected speech. 427 U.S., at 62. The restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them. The Court did not imply that a municipality could ban all adult theaters -- much less all live entertainment or all nude dancing -- from its commercial districts citywide . . . .
>
> 452 U.S. at 71.

The Court pointed out the importance of the fact that the number of locations for adult theaters in Detroit was not restricted by its ordinance:

> Justice STEVENS relied on the District Court's finding that compliance would only impose a slight burden on First Amendment rights, since there were "myriad locations" within the city where new adult movie theaters could be located in compliance with the ordinances . . . .

Id., n.10.

Several federal appellate courts, relying on *American Mini Theatres*, have invalidated ordinances which imposed a substantial limitation on the number of locations set aside for adult businesses by local zoning schemes. *See, C.L.R. Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983) (finding zoning ordinance allowing only two to four adult businesses to be unlawfully restrictive of First Amendment rights); *Alexander v. City of Minneapolis*, 698 F. 2d 936 (8th Cir. 1983) (holding that zoning ordinance which closed all pre-existing adult businesses, and provided only twelve locations in the entire city for all adult businesses, was unconstitutional); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981) (striking zoning ordinance which failed to provide adequate locations for adult businesses); *Christy v. City of Ann Arbor*, 824 F.2d 489 (6th Cir. 1987) (vacating a trial court's finding that 0.23% of Ann Arbor was constitutionally sufficient to accomodate adult businesses); *754 Orange Ave., Inc. v. City of West Haven*, 761 F.2d 105 (2d Cir. 1985) (striking down adult zoning ordinance in part because city failed to demonstrate adequate available locations for adult businesses); *Basiardanes v. City of*

Galveston, 682 F.2d 1203 (5th Cir. 1982) (striking zoning ordinance which failed to provide adequate locations for adult theaters); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981) (striking zoning ordinance which effectively banned adult theaters); *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1987) (vacating judgment which had found 1.35% of Whittier's land area sufficient for adult businesses); *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348 (9th Cir. 1985) (vacating trial court order upholding ordinance requiring nine of ten adult businesses to close, and failing to provide adequate sites for relocation); *Ebel v. City of Corona*, 767 F2d 635 (9th Cir. 1985) (striking adult zoning ordinance which failed to provide adequate locations for adult businesses).

Several district courts have reached the same conclusions. *See, i.e., Amico v. New Castle County*, 571 F.Supp. 160 (D. Del. 1983); *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696 (M.D. Fla. 1978); *North Street Book Shoppe v. Village of Endicott*, 582 F.Supp. 1428 (N.D. N.Y. 1984); *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207 (N.D. Ga. 1981); and *815 Foxon Road, Inc. v. Town of East Haven*, 605 F.Supp. 1811 (D. Conn. 1985).

In those cases where zoning ordinances have been upheld, there has been an express finding, supported by the evidence, that the ordinances did not significantly restrict available locations. *See, i.e., Lydo Enterprises, Inc. v. City of*

Las Vegas, 745 F.2d 1211 (9th Cir. 1984); *S.D.J., Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *cert. denied*, _____ U.S. _ (1989); *F.W./PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) *cert. granted on other grounds*,__ U.S. _____ (1989).

In this case the District Court has upheld an ordinance which not only severly restricts adult entertainment by placing an absolute limit of eight on the number of such businesses which could *theoretically* open and operate, but will have the practical effect of totally eliminating such businesses from the community by January 1, 1992.

In 1986, this Court revisited the subject of adult business zoning. In *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) the Court upheld a municipal ordinance which set aside approximately 5% of a community's land area for adult theaters. 475 U.S. at _____, 106 S.Ct. at 932. The ordinance had prospective application only. 475 U.S. at ___, 106 S.Ct. at 927. The Court found that the ordinance did not unduly restrict adult entertainment.

Renton, Washington was a community of about 16 square miles, with a population of 32,000 people. At the time it enacted its adult business zoning provision there were no adult businesses operating in the city. In its ordinance, the city had left 520 acres available for adult businesses, a space that

would accomodate 435 adult theaters.[8] In startling contrast, the City of Daytona Beach -- with twice the land area and twice the population, has left enough land for eight adult businesses at a maximum!

In *Renton*, the Court explained how its decision was in harmony with *American Mini Theatres*, including Justice Powell's concurring opinion. The very thrust of those two cases seems to be that an adult business zoning ordinance will be upheld only if: 1) it is aimed at secondary effects of the businesses, not at suppressing speech;[9] and 2) it leaves the availability of sites for adult businesses virtually unrestricted. As the Court said in *American Mini Theatres*, one of the principal reasons it upheld the Detroit ordinance was that it left the market for adult entertainment virtually unrestrained, that there were "myriad" locations in Detroit for new adult businesses. 427 U.S. at 71."Myriad" means "numerous," "multitudinous," "legion," "many." Respondent's counsel at trial defined it as "a great number." One would hardly call "eight" a great number, or numerous, or voluminous. And as the several courts which have applied *American Mini Theatres* since 1976 have concluded, a zoning ordinance which fails to

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8 As pointed out in the Jurisdictional Statement in the Renton case (at page 18, n. 38) the 435 figure was computed by dividing the number of square feet needed to accomodate an adult theater into the number of square feet in 520 acres.

9 This ordinance is non content-neutral. The City has never seen any evidence that a single adult nightclub, presenting nonobscene nude dancing and selling no alcoholic beverages, causes any secondary effects, in Daytona Beach or any other city.

provide adequate locations for adult businesses runs afoul of the First Amendment.

The record in this case demonstrates that the available locations for adult businesses in Daytona Beach are woefully inadequate. There is no reasonable opportunity to open and operate an adult theater in the City. Unless this Court grants review, the decision below will become the law in the Eleventh Circuit, and will place that circuit in direct conflict with overwhelming case law from this Court and several federal trial and appellate courts. The Court should grant review to bring the law in the Eleventh Circuit in line with *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

II

THE DECISION BELOW, UPHOLDING AN ORDINANCE SERIOUSLY RESTRICTING FIRST AMENDMENT ACTIVITIES, WHICH IS REPLETE WITH FACIALLY VAGUE AND OVERBROAD TERMS, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND FEDERAL APPELLATE COURTS OVER MORE THAN THIRTY YEARS.

It is long settled that an ordinance which regulates First Amendment activity must be drawn in terms so clear and unambiguous that it leaves no room for subjective interpretation and arbitrary enforcement by government officials. Yet the ordinance before this Court has several provisions which are so totally subjective as to be facially unconstitutional.

The ordinance prohibits the operation of an adult business within 400 feet of any public or semi-public place "where large numbers of minors regularly travel or congregate." There is no definition of any of the terms in this phrase, nor reference to where definitions might be found.

An adult theater is one in which a single instance of nudity occurs which is *harmful to minors*. Fred Holmes, the official charged with enforcing the ordinance doesn't know what "harmful to minors" means, by his own testimony. Yet he stated that the exposure of a single female breast, even one time, would bring a business within the prohibitions of the

ordinance. This Court has ruled that nudity, in and of itself, is not obscene even to minors. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). *See also, Tollis v. San Bernadino County*, 827 F.2d 1329 (9th Cir. 1987). Nevertheless, Holmes interpreted the ordinance in this case in such a manner as to make even the briefest exposure of a female breast "harmful to minors," whether he knew what that phrase meant or not.

The provision forbidding the location of an adult business near any place "where large numbers of minors travel or congregate" is invalid under the *Erznoznik* decision. In that case this Court struck an ordinance requiring drive-in theaters which showed movies with any nudity to construct high fences around them. As the Court explained, the ordinance could not be justified simply by a desire to protect children, unless it were limited to films showing sexually explicit fare. As in *Erznoznik*, the Daytona Beach ordinance applies to any business which, live or in a film or book, allows the single exposure of a female breast, regardless of circumstances.

One more phrase must be examined in light of Petitioners' unsuccessful claim that the ordinance was vague. The locational restrictions can be waived pursuant to sec. 51.3 of the ordinance if the City finds, *inter alia*, that a waiver would "not be contrary to the public interest and that the spirit and intent of the ordinance will be observed." The trial court even

chastised Petitioners for failing to apply for a waiver under this provision.

First, Petitioners did not have to apply for a waiver before bringing their action. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982). And more significantly, the waiver provisions are blatantly unconstitutional under controlling case law.

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1958) this Court struck an ordinance which required a permit to conduct a parade. The Court, in finding the ordinance facially invalid, said:

> There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.
>
> 394 U.S. at 150-51.

See also, Staub v. City of Baxley, 355 U.S. 313 (1958).[10]

The ordinance here is so vague in its terms that the official charged with its interpretation and enforcement has no idea what it means. The definition of "adult theater" is vague; the waiver provisions are vague; the locational restrictions are vague. This ordinance is precisely the type of restriction on First Amendment activities that has been struck by courts for many decades. This Court should grant review, to reaffirm the long-standing principle, deeply rooted in our Constitution and several decades of court decisions, that when a law includes a requirement that one obtain official approval before freedom of speech may be engaged in, that law may not be so vague as to allow any official the power to authorize only that speech of which the government approves.

---

10 Indeed, the list of cases is lengthy where facial vagueness, which would allow the granting or denial of permission to engage in constitutionally protected speech on the whim of the government, has been found unconstitutional. A very brief list would include: Cox v. Louisiana, 379 U.S. 536 ((1965); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1939); Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. State, 308 U.S. 147 (1939); and Hynes v. Mayor of Oradell, 425 U.S. 610 (1976).

Dated March 24, 1989.

Respectfully submitted,

RICHARD L. WILSON
ERIC A. LATINSKY

Attorneys for Petitioners

88-1580

Supreme Court, U.S.
FILED
MAR 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1988

DEL PERCIO, INC., et al.,

Petitioners,

v.

CITY OF DAYTONA BEACH,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Appendix A

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT: Middle District of Florida/Orlando Division
CASE TITLE: Function Junction, Inc., Pink Pussycat, Inc. and Del Percio, Inc. V. City of Daytona Beach	DOCKET NUMBER: 86-117-Civ-Orl-18
	NAME OF JUDGE OR MAGISTRATE: Judge G. Kendall Sharp

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge [redacted] named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiffs take nothing, that the action be dismissed on the merits, and that the defendant City of Daytona Beach recover of the plaintiffs Function Junction, Inc., Pink Pussycat, Inc. and Del Percio, Inc., its costs of action.

Dec 17 3 05 PM '87

Copies to:

Richard L. Wilson, Esquire
Frank B. Gummey, III, Esquire

CLERK: DONALD M. CINNAMOND

DATE: 12-17-87

for Mc Cleary

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 86-117-CIV-ORL-18

FUNCTION JUNCTION, INC.,
a Florida corporation,

PINK PUSSYCAT, INC.,
a Florida corporation,
and

DEL PERCIO, INC.,
a Florida Corporation

Plaintiffs,

v.

CITY OF DAYTONA BEACH,
a Florida municipal corporation,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action, challenging the constitutionality of a City of Daytona Beach ordinance which regulates the location of adult theaters, was tried before the court without a jury. Based upon the testimony and evidence admitted at trial and the facts admitted in the joint pretrial stipulation, the court enters the following findings of fact and conclusions of law, pursuant to Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

Plaintiffs are Florida corporations that operate lounges, which provide nude or seminude (topless) dancing as entertainment within the City of Daytona Beach. Following the Florida Supreme Court decision in City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985), which upheld the ability of Daytona Beach to ban nudity in conjunction with the sale of alcohol under the Twenty-first Amendment, plaintiffs no longer sell alcohol in their establishments because they offer nude dancing. The presentation of nude dancing classifies plaintiffs' establishments as adult theaters under Zoning Ordinance No. 78-400 of the City of Daytona Beach, Florida. Daytona Beach Ordinance No. 81-292, incorporated in Zoning Ordinance No. 78-400, precludes adult theaters from the zoning districts where plaintiffs' establishments presently are located and places them within specific BA zones throughout the city. Plaintiffs contend that Ordinance No. 81-292 poses an additional, prohibitive obstacle to their presentation of nonobscene nude dancing, protected under the First Amendment.

Ordinance No. 81-292, adopted by the City Commission on September 16, 1981, is part of a redevelopment program in Daytona Beach. Sections 1 through 4 of Ordinance No. 81-292 amend identified articles of Daytona Beach Zoning Ordinance No. 78-400. Chapter 3 of Zoning Ordinance No. 78-400 defines an adult theater:

> ADULT THEATRE.
>
> A use which exhibits any motion picture, exhibition, show, live show, representation, or other presentation which, in whole or in part, depicts nudity [sic], sexual conduct, sexual excitement, or sadomasochistic abuse and is harmful to minors, all as defined in 847.013, F.S., as may be amended, and admission of minors to which is unlawful in accordance with 847.013, F.S., as may be amended. This includes any exhibition to one or more persons, including facilities commonly known as peep booths or peep shows.

Zoning Ordinance No. 78-400, chapter 3, Definitions, amended by Ordinance No. 82-67 (1982). Ordinance No. 81-292, section 4 amended Zoning Ordinance No. 78-400 by adding section 51 to article 5, quoted below in pertinent part:

> Section 51. Adult Bookstores and Adult Theaters.
>
> 51.1 Purpose: To reduce the adverse impacts of adult bookstores and adult theaters upon the City's neighborhoods by:

51.1.1 Avoiding the concentration of uses which cause or intensify physical and social blight.

51.1.2 Improving visual appearance of adult uses.

51.1.3 Reducing negative impacts on adult uses upon other business uses, neighborhood property values, residential areas, and public and semi-public uses.

51.1.4 Insuring that adult uses do not impede redevelopment and neighborhood revitalization efforts.

51.1.5 Avoiding allowing adult uses in heavily used public pedestrian areas.

51.2 Location.

51.2.1 Adult bookstores and adult theaters shall be permitted as a matter of right in BA, BA-1, and BA-2 Districts. These adult uses shall not pyramid into or be allowed within the BW Districts.

51.2.2 It shall be unlawful to locate any adult theater and adult bookstore within 400 feet of any area of the City zoned R-laa, R-la, R-la(1), R-1b, R-1c, R-2, R-2a, RA, R-2b, RP, R-3, PUD, T-1 or T-2.

51-2.3 It shall be unlawful to locate any adult bookstore and adult theater within 1,000 feet of any other such adult bookstores or adult theaters.

51.2.4 It shall be unlawful to locate any adult bookstore and adult theater within 400 feet of any church, school, public park or playground, or any other public or semi-public place or assembly where large numbers of minors regularly travel or congregate.

51.2.5 Distances in 51-2.3 and 51.2.4 shall be measured from property line to property line, without regard to the route of normal travel.

. . .

51.3 Waivers. The City Commission, after study and recommendation by the City Planning Board, may grant as a special exception after holding a public hearing, a waiver of the locational provisions for adult bookstores and adult theaters, upon a finding that all of the following requirements have been met:

51.3.1 That the proposed use will not be contrary to the public interest and that the spirit and intent of the ordinance will be observed.

51.3.2 That the proposed use will not enlarge or encourage the development or further development of a blighted area.

51.3.3 That the establishment of an additional such regulated use in the area will not be contrary to any program of neighborhood conservation, or will interfere with any program of urban revitalization.

51.4 Nonconforming Adult Bookstores and Adult Theaters: Adult bookstores and adult theaters which have been established at their existing locations prior to the effective date of this ordinance revision, and which are not in conformity with the requirements of this ordinance revision may continue to operate until January 1, 1992. If a nonconforming spacing situation can be eliminated by the abatement of one or more such establishments, the establishment which has been in business for the longest period of time shall be permitted.

Zoning Ordinance No. 78-400, article 5, section 51.

Gerald Langston, Director of Planning and Redevelopment for the City of Daytona Beach, who coordinated with the task study group in formulating Ordinance No. 81-292, testified as an expert in the field of urban planning. He stated that Daytona Beach is an unusual Florida city because its structures are old in comparison to the proliferation of new communities. Thirty percent of Daytona Beach housing is pre-1940 and a substantial number are pre-1950. Furthermore, Daytona Beach exhibits the conditions prevalent in larger northern cities, such as a blighted core area, with the consequent problems of professionals residing outside the city, a high percentage of low income individuals and retirees living within the city, and difficulty in attracting quality housing.

Langston testified that preparations for the redevelopment plan began two years prior to Ordinance No.

81-292, enacted in September, 1981. The study of Daytona Beach blight in early 1981, identified two blighted areas: 1) the old downtown area, and 2) the beachside area. The conditions that led to the conclusion of blight were a significant percentage of deteriorating structures; a large number of small, 1940 and 1950-sized lots, which did not allow cars; a notable parking problem; a high incidence of crime, particularly, on the beachside; and a large percentage of antiquated, underground utility systems, such as drainage, water and sewer systems. The changed neighborhoods, attributed to blight, deterred investment, and hotel development ceased in 1975. In the late 1970's, Daytona Beach was denominated the "City of Sleaze."

Pursuant to Florida Statutes, chapter 163, a special board, the Redevelopment Design and Review Board (Redevelopment Board), was created in Daytona Beach to deal with the blight problem. Langston works with this board, which includes redevelopment of zoning districts, involving changes in permitted uses. For example, certain uses, such as bars, may be limited or spaced, while some uses, such as blood banks, may be prohibited in particular areas. The Redevelopment Board also considered studies of blight in Boston and Detroit by the American Society of Planning Officials in 1979-1980. These studies show strong evidence that the central location of adult uses, like the "Combat Zone" in Boston, causes the blighted area to grow and creates blight in fringe areas. Furthermore, Langston testified that adult

businesses have impacted on crime in the area surrounding Daytona Beach.

Based upon his education, experience, knowledge of blight in Daytona Beach and his participation in drafting the subject ordinance, Langston testified that adult businesses that provide live nude and seminude entertainment promote and perpetuate urban decay. He explained, however, that a total ban was not considered because that would be unconstitutional. The Redevelopment Board merely limited placement of such establishments to particular zoned areas of Daytona Beach. Langston testified that the redevelopment program was "having a real visible impact on the city" in the core areas.

Plaintiff Function Junction, Inc., d/b/a the Sugar Shack, owned by Leonard Del Percio and his brother, was located on North Atlantic Avenue when the subject zoning ordinance was enacted. Prior to filing this action, it was relocated to 22 South Ocean Avenue. Plaintiff Pink Pussycat, Inc., d/b/a the Red Garter, owned by Christie Geaneas, his wife and son, has been located at 1001 Main Street for nineteen years. The Sugar Shack and the Red Garter are in the officially designated beachside blighted area of Daytona Beach.

Plaintiff Del Percio, Inc., d/b/a the Shingle Shack, owned by Leonard Del Percio, was located at 309 Madison Avenue when the subject zoning ordinance was enacted. Following enactment of the ordinance, it relocated to 640 North Ridgewood Avenue. since the Shingle Shack occupies a

corner lot, the relocation was merely an address change. Del Percio testified that he demolished part of the structure, resulting in a changed entrance and address for the lounge.

The Shingle Shack is not located in an officially designated blight area. It is, however, in a state-approved enterprise zone as defined by Florida Statutes, chapter 290, section 290-004 (1) (a). Essentially, an enterprise zone is one in which there is a predominance of deteriorating structures, causing conditions detrimental to public health, safety, morals or welfare, such as juvenile delinquency and crime. Through the Florida Enterprise Zone Act, Florida Statues, chapter 290, sections 290.001-290.015, the state has declared revitalization of enterprise zones to be a public policy and purpose and has established a process of identifying severely distressed areas through the local community. The state provides economic incentives by state and local governments to induce private investment in enterprise zones.

Langston testified that the land uses around the Shingle Shack in the area of the Ridgewood Avenue intersection include an adult bookstore, older housing and light industry. Crime also has been reported in the vicinity. Furthermore, Langston testified that "absolutely" nonblighted areas may be more blighted than officially designated blight areas for redevelopment. He explained that there is limited money, staff and time that can be allotted to a blighted area of the city. An area is designated as blighted if the city determines that,

because of market conditions, it can be improved if given the opportunity. In a nonblighted area, the opportunity for improvement is bleak.

Langston also testified that an adult business impacts on crime in the surrounding area. David Smith, assistant state attorney, who has prosecuted prostitution and drug offenses in Daytona Beach, gave concurring testimony. Smith identified the beach area where the Sugar Shack and Red Garter are located as well as the area around the Shingle Shack as being areas of prostitution. He testified that "most definitely" there were more drug and prostitution offenses in topless bars than in other bars.

Del Percio admitted that two of his dancers had been involved in cocaine offenses; that he and his manager had been charged with violations of the nudity ordinance; that approximately a dozen of his dancers had been charged with violations of the nudity ordinance, most recently in February or March, 1987; and that he had been fined $10,000.00 for both his actions and those of his employees. Geaneas admitted that the Red Garter was closed involuntarily from July 8, 1983 through January 4, 1984 for drug offenses, which resulted in suspension of their alcoholic beverage license, and that a barmaid was charged with violation of the nudity ordinance. All three plaintiffs have been cited by the Florida Department of Business Regulation Division of Alcoholic Beverages and

Tobacco in connection with drug violations at their establishments.

On August 26, 1981, prior to enactment of the subject ordinance in September, 1981, the Daytona Beach City Commission held a special meeting for the purpose of educating the community regarding the extent of pornography and prostitution in the city. Attached to the minutes is an investigation report and list of twenty sexually oriented businesses in Daytona Beach and their activities. The Shingle Shack is listed as being in the area with "our biggest problems," which include drug and prostitution-related homicides, numerous rapes and robberies, with the area being known as a "haven for prostitutes." The Shingle Shack is described as "[t]opless dancing - wet T-shirt contest." Several arrests of dancers for lewd and lascivious conduct are noted and it is indicated to be a "[m]ajor prostitute hang-out" with arrests of customers, "who get carried away during performances."

Fred Holmes, Deputy Building Official for the City of Daytona Beach, whose department processes applications for occupational licenses, testified concerning the interpretation and application of Ordinance No. 81-292. Adult theaters, defined as involving exhibitions of nudity, are confined to BA zones. Holmes clarified that live, nude dancing or female breast exposure qualifies the establishment as an adult theater which must be located in a BA zone, although alcohol is excluded.

While the amended zoning ordinance defines an adult theater, Florida Statutes, chapter 847, section 847.013 describes nudity, including breast exposure and activities harmful to minors. Holmes testified that even brief breast exposure would necessitate denying an application for an establishment providing such display if it were not in a BA zone.

Holmes testified that the preamble of the zoning ordinance allows the building officials to interpret and to enforce it. He interprets the portion of Ordinance No. 81-292, section 51.2.4, which states that it shall be unlawful to locate an adult theater within 400 feet of "any other public or semi-public place or assembly where large numbers of minors regularly travel or congregate" to mean places of assembly to include "all buildings or portions of buildings used for gathering together 50 or more persons for such purposes as deliberation worship, entertainment, dining, amusement, or awaiting transportation." Holmes uses the Life Safety Code definition because he considers it appropriate, and he expects his successors to follow his interpretation.

Ordinance No. 81-292 makes it unlawful to locate an adult theater within footage distances of certain zones or uses. Specifically, Section 51.2.2 requires 400 feet between an adult theater or adult bookstore; and section 51.2.4 requires 400 feet between an adult theater and any church, school, public park or playground, or any other public or semi-public place or assembly where large numbers of minors regularly travel or

congregate. When Holmes reviews a license application, he makes a physical measurement in a circle around the location. The designated zones or uses must not be within the specified footage from the potential adult theater.

Holmes previously had identified in his deposition, interrogatory answers and an affidavit twelve potential sites for adult theaters in Daytona Beach. The Deputy Planning Director for the City of Daytona Beach photographed the sites as well as described the areas based on his personal inspection. These pictures and descriptions were admitted into evidence. While twelve sites potentially are available for adult theaters, Holmes testified that, because of compliance with spacing specifications of Ordinance No. 81-292, a total of eight adult theaters could operate under the present conditions.

Plaintiffs brought this suit because they claim that they are effectively precluded from operating their respective adult theaters by the spacing requirements within BA zones of Ordinance No. 81-292. Both Del Percio and Geaneas testified that they have lost profits at their establishments when the dancers have had to perform more fully clothed. This has occurred twice: following the Florida Supreme Court decision in City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985), which held that the city could regulate nudity under the Twenty-first Amendment; and following the effective date of Ordinance No. 81-292, when plaintiffs' establishments could no longer operate as adult theaters in their current zoning

districts. Plaintiffs presented the testimony of a private investigator regarding the lack of locations for plaintiffs' establishments which meet the requirements of Ordinance No. 81-292. This witness admitted, however, that he was not a city zoning official, and that his site investigations were an attempt to coordinate the zoning ordinance with available sites in BA zones without any inquiries of the City of Daytona Beach as to whether or not a permanent adult theater was established at any particular location.

Cledith Oakley, a Florida real estate broker, testified that the Daytona Beach marketplace is constantly changing in land use. He stated that part of an automobile dealership, which plaintiffs have contended is the only location meeting the ordinance specifications, is a potential site for an adult theater, provided plaintiffs are willing to purchase the property. Oakley explained that scarcity or availability of adult uses is not the appropriate inquiry, but rather, supply and demand. He testified that there are a number of adult theaters in Daytona Beach, and that many such uses result in less profit for individual proprietors.

Ordinance No. 81-292, section 51.3 permits the Daytona Beach City Commission to grant a waiver of the location provisions to an adult theater following review and recommendation of the City Planning Board, a public hearing and a finding that three requirements have been met. First, the proposed use will not be contrary to the public interest and the

spirit and intent of the ordinance. Second, the proposed use will not further the development of a blighted area. Third, an additional regulated use will not be contrary to any programs of neighborhood conservation or urban revitalization.

Holmes testified that he was not aware of any application by plaintiffs for utilization of the waiver provisions for the Sugar Shack, the Red Garter or the Shingle Shack. In denying plaintiffs' motion for preliminary injunction, the court noted that plaintiffs had not attempted to exhaust their administrative remedy of waiver, which would be particularly applicable if the result that they sought would not contravene public interest in neighborhood conservation. Plaintiffs' attorney stipulated that plaintiffs have not applied for waivers. The court also notes that Ordinance No. 81-292 allows nonconforming adult theaters and bookstores that were established prior to the effective date of the ordinance to continue to operate until January 1, 1992. If a nonconforming spacing problem can be eliminated by abatement of one such establishment, then the establishment which has been in business the longest shall be permitted.

In this action, plaintiffs allege that Ordinance No. 81-292 leaves insufficient or no locations for their adult theaters. They seek a final judgment declaring Ordinance No. 81-292 unconstitutional, a permanent injunction enjoining its enforcement, and attorneys' fees. Defendant contends that the subject ordinance is constitutional on its face and in application.

Defendant argues that Ordinance No. 81-292 is a reasonable time, place and manner zoning restriction, enacted to counter the secondary effects caused by adult businesses and that there are adequate, alternative avenues of communication.

CONCLUSIONS OF LAW

The court has jurisdiction of this action pursuant to 29 U.S.C. Secs 1331, 1343 and 42 U.S.C. Sec 1983. Plaintiffs claim attorneys' fees under 42 U.S.C. Sec. 1988. The issue before the court is the constitutionality of Daytona Beach zoning Ordinance No. 81-292 as applied to the location of plaintiffs' establishments.

Nude dancing is protected expression under the First Amendment. Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981); International Food & Beverage Systems v. City of Fort Lauderdale, 794 F.2d 1520, 1525 (11th Cir. 1986). In contrast, waitressing, "is devoid of constitutional protection." International Food & Beverage Systems, 794 F.2d at 1525; South Florida Free Beaches, Inc. v. City of Miami, 734 F.2d 608, 610 (11th Cir. 1984). Constitutionally protected expression, however, is not absolute and may be regulated reasonably as to time, place, and manner, provided that the regulation is content neutral, serves a significant governmental interest, and allows ample alternative channels for communication to exist. Clark v.Community for Creative No-

Society for Krishna Consciousness, Inc., 452 U.S. 640, 647-55 (1981); International Food & Beverage Systems, 794 F.2d at 1525. The Supreme Court recently has addressed time, place, and manner analysis in the context of a constitutional challenge to a Renton, Washington ordinance that prohibited the location of adult motion picture theaters within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school, a case similar to and dispositive of this action. City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986).

The Court found the Renton ordinance "completely consistent with our definition of 'content-neutral' speech regulations as those that 'are justified without reference to the content of the regulated speech." Renton, 475 U.S. at 48 (emphasis in original) (quoting Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976)). Recalling Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Court observed that the city could have attempted to close the theaters or to limit their number if it had been concerned with restricting the message conveyed. Renton, 475 U.S. at 48; American Mini Theatres, 427 U.S. at 82 n.4 (Powell, J., concurring). The Court also found that the ordinance did not contravene "the fundamental principle that underlies our concern about 'content-based' speech regulations:" that the government may not select who may use a forum based upon its agreement with

the views conveyed. Renton, 475 U.S. at 48-49; Police Department of Chicago v. Mosley, 408 U.S. 92, 95-96 (1972). Instead, the "predominate" concern of the Renton City Counsel was with the "secondary effects" of adult theaters on the surrounding community and not with the "content" of the films. Renton, 475 U.S. at 47 (emphasis in original).

The evidence in this case showed that the primary concern of the City of Daytona Beach in enacting Ordinance No. 81-292 as part of its redevelopment program was with the secondary effects caused by the proliferation of adult theaters in that community. Furthermore, Daytona Beach has not banned adult theaters, such as those operated by plaintiffs, but has regulated their location without reference to content of the exhibited expression. Renton, 475 U.S. at 46-48. The court concludes that Ordinance No. 81-292 is content neutral.

The Supreme Court also found that the Renton ordinance was designed to promote a substantial governmental interest. "[A] city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'" Id. at 50 (quoting American Mini Theatres, 427 U.S. at 71). Furthermore, the Court held that Renton was entitled to rely on the experiences of other cities, regarding neighborhood blight caused by the presence of adult theaters, in enacting its adult theater zoning ordinance. Renton, 475 U.S. at 51. In discussing the application of Renton, the Eleventh Circuit distinguished zoning cases from police action

cases. International Food & Beverage Systems, 794 F.2d at 1527; c.f.Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985); Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir.), cert. denied, 459 U.S. 859 (1982) (police action cases as opposed to zoning cases). In contrast to actual police-type experience required by courts in police action cases, "[z]oning involves far wider interests and does not now depend for its validity on the experience of the chief of police or the blotter of the local station." International Food & Beverage Systems, 794 F2d at 1527.

Renton recognized two constitutionally permissible methods of regulating the location of adult theaters to effectuate substantial governmental interests: concentration, as in Renton, or dispersion, as in Daytona Beach. Renton, 475 U.S. at 52. Like the Renton ordinance, Ordinance No. 81-292 is "'narrowly tailored' to affect only that category of theaters shown to produce the unwanted secondary effects." Id. at 52; cf. Schad, 452 U.S. at 76-77; Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-18 (1975) (Ordinances, involving nude entertainment, were held to be offensive to the First Amendment because they were not precisely drafted to achieve substantial governmental interests.). Additionally, the Eleventh Circuit has explicated that a zoning ordinance should not be reviewed in isolation as a "whim of the commissioners" or as an imposition of "their notions of moral behavior on the community," but rather that it should be "tested by reference to

the entire zoning scheme." International Food & Beverage Systems, 794 F.2d at 1527.

In this case, the court was presented with extensive evidence and testimony, regarding the dilapidated and deteriorated state of many of the areas within the City of Daytona Beach. By means of its redevelopment plan, of which Ordinance No. 81-292 is a component, Daytona Beach is seeking to improve its city for the future. In that commendable effort, the city necessarily must make zoning decisions that involve lines of demarcation. The court concludes that Ordinance No. 81-292 serves a significant and substantial governmental interest and that plaintiffs' continued offering of nude dancing in their establishments at their present locations would seriously thwart, if not undermine and stymie the Daytona Beach redevelopment plan.

Plaintiffs vehemently assert that there are few or no possible locations for their establishments within the areas of Daytona Beach zoned for their businesses. They also claim that they lost substantial profits during times when they have been prohibited from presenting nude dancing. The city has shown by affidavit, photographs, and testimony that twelve locations in Daytona Beach potentially could accommodate plaintiff's lounges.

The Supreme Court was not convinced by the Renton respondents' arguments that there were no practical or commercially viable locations for their adult theaters:

> That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to, lawful speech," American Mini Theatres, 35 (plurality opinion), we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices. See id., at 78, 96 S.Ct., at 2456 (POWELL, J., concurring) ("The inquiry for First Amendment purposes is not concerned with economic impact").

Renton, 475 U.S. at 54. Recognizing that the First Amendment "does not guarantee anyone a profit," the Eleventh Circuit explained that "[a]ll it [the First Amendment] requires is that 'speech,' 'expression,' and 'ideas' be allowed a physically adequate forum." International Food & Beverage Systems, 794 F.2d at 1526. While a city may limit alternative avenues of communication, it may not limit them "'unreasonably,'" and "[w]hat is reasonable cannot be ascertained by reference to nothing except the wishes of the nude bar proprietors." Id.

The court is satisfied that the City of Daytona Beach has provided areas of the city for the protected expression of nude dancing within the zoning regulations, which are part of its redevelopment plan. In fact, Ordinance No. 81-292, by allowing a 400-foot distance between adult theaters and residential areas, churches, schools, and parks is more

generous in its spacing requirements than the Renton ordinance, requiring a constitutionally acceptable 1,000-foot separation. While the city must adequately and reasonably provide locations for the protected expression of nude dancing, it is not required to guarantee these particular plaintiffs a profit at the expense of the public interest and a municipal redevelopment program of which Ordinance No. 81-292 is a part.

The court concludes that Ordinance No. 81-292 is a valid governmental response to the detrimental, secondary effects caused by adult theaters and that it was not enacted to suppress protected expression. Renton, 475 U.S. at 54. Daytona Beach "has sought to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large by preventing those theaters from locating in other areas. This, after all, is the essence of zoning." Id.

Finally, the court is cognizant that plaintiffs have made no effort to apply for the waiver provision of Ordinance No. 81-292 or to investigate the applicability of the nonconforming use provision. Plaintiffs cannot expect the court to create a special exception for them when they have made no attempt to comply with the appropriate, remedial provisions of a constitutionally sound zoning ordinance, responsive to the "'admittedly serious problems' created by adult theaters." Id. (quoting American Mini Theatres, 427 U.S. at 71). The Clerk

of Court will enter judgment in favor of defendant, the City of Daytona Beach.

It is SO ORDERED at Orlando Florida, this 17th day of December 1987.

G. KENDALL SHARP
United States District Judge

Copies to:

Richard L. Wilson
Frank B. Gummey, III

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

FUNCTION JUNCTION, INC.,
a Florida corporation,

PINK PUSSYCAT, INC.,
a Florida corporation, and

DEL PERCIO, INC.,
a Florida corporation,

Plaintiffs

v. CASE NO.86-117-CIV-ORL-18

CITY OF DAYTONA BEACH,
a Florida municipal corporation,

Defendant.

ORDER

The prevailing defendant has filed a timely motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. Defendant's motion, however, is a misnomer because it relates to the court's December 17, 1987 findings of fact and conclusions of law rather that to the judgment entered on the same day. Since defendant's motion also is timely as a motion to amend the findings of fact under Rule 52(b) of the Federal Rules of Civil Procedure, the court will consider it a Rule 52(b) motion.

Defendant's suggested amendments affect the first paragraph of the court's findings of fact only. The plaintiffs have not responded to defendant's motion. Based upon defendant's factual representations and plaintiffs' apparent concurrence since they have filed no opposition, the court **GRANTS** defendant's motion.

The court **AMENDS** its findings of fact as follows:

> Plaintiffs are Florida corporations that operate lounges, which have provided nude or seminude (topless) dancing as entertainment within the City of Daytona Beach. Following the Florida Supreme Court decision in City of Daytona Beach v. Del Percio, 476 So. 2d 197 (Fla. 1985), which upheld the ability of Daytona Beach to ban nudity in conjunction with the sale of alcohol under the Twenty-first Amendment, plaintiffs cannot offer topless dancing in their establishments because they sell alcohol. Plaintiffs seek to revive nude or seminude dancing in their lounges by ceasing to sell alcohol.
>
> The presentation of nude dancing would classify plaintiffs' establishments as adult theaters under zoning Ordinance No. 78-400 of the City of Daytona Beach, Florida.

With the exception of the above designated sentences, the court's findings of fact and conclusions of law shall remain as entered on December 17, 1987. The judgment entered on December 17, 1987 shall not be altered or amended.

It is **SO ORDERED** at Orlando, Florida, this 27th day of January, 1988.

G. KENDALL SHARP
United States District Judge

Copies to:

Richard L. Wilson
Frank B. Gummey, III

App. C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

88-3117

DO NOT PUBLISH

D.C. Docket No. 86-117

FUNCTION JUNCTION, INC., PINK PUSSYCAT, INC., DEL PERCIO, INC.,

Plaintiffs-Appellants

versus

CITY OF DAYTONA BEACH,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(December 16, 1988)

Before HILL and JOHNSON Circuit Judges, and NICHOLS*, Senior Circuit Judge.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1

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*Honorable Philip Nichols, Jr., Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

(3)

88-1580-1

No. 88-1580

Supreme Court, U.S.
FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

DEL PERCIO, INC., et al.,

Petitioners,

v.

CITY OF DAYTONA BEACH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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350P

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review by Petitioners contain factual statements unsupported by the record and contrary to the trial court's findings of fact. Respondent would state the questions as follows:

1. Is a city's adult entertainment zoning ordinance, which provides a limited number of potential sites for the location of sexually oriented businesses, an unconstitutional restriction of First Amendment activities where the ordinance is part of a bona fide redevelopment program in a blighted urban area which was enacted to minimize the secondary effects of such businesses and there has been no showing that the sites are inadequate to meet the demand for such uses in the community?

2. Absent evidence that the wording of an adult business zoning ordinance has actually resulted in any deprivation of First Amendment rights, does the language of the ordinance meet constitutional requirements where it has a commonly accepted meaning although not defined with mathematical precision within the ordinance itself?

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No. 88-1530

In The

Supreme Court of the United States

October Term, 1988

DEL PERCIO, INC., et al.,

Petitioners,

v.

CITY OF DAYTONA BEACH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case is riddled with gross omissions and inaccuracies which have the effect of misinforming this Court as to the true basis of the rulings below.

Respondent, The City of Daytona Beach, is a Florida municipal corporation established in 1925 by the consolidation of three existing small cities. At the time petitioners filed their complaint, the City had an approximate

population of 59,000 and a land area of approximately 31.5 square miles.

Contrary to petitioners' statement of fact, the record does not provide any evidence as to whether "an average mix of residential, commercial and industrial uses [exists], and entertainment plays a large role in the City's economy." The record does contain evidence, which is summarized in the trial court's Order under the heading "Findings of Fact," that the City is far from average. The court found that Daytona Beach is "an unusual Florida city" because it is an older community suffering from many of the problems found in much larger northern cities such as old housing stock, an inability to attract new development, and a blighted core area. In 1981 the City did a study which resulted in the designation of two central areas of blight and a comprehensive program of redevelopment was undertaken.

This redevelopment program, which is the bedrock upon which the challenged zoning ordinance was enacted, tried, and upheld, is not even mentioned by petitioners before this Court.

The numerous steps taken by the City toward the goal of redevelopment are discussed in detail in the record, including such measures as local and state designations of blighted areas, creation of new zoning districts and regulatory boards, extensive financial investments by the City in infrastructure renovation, and institution of mandatory property maintenance requirements. The challenged Ordinance No. 81-292, adopted in September 1981, was part of this effort. It provides that adult theaters and bookstores shall be permitted as a matter of right

in BA zoning districts provided certain objective spacing limitations are met. No special approval is required in BA districts. The ordinance additionally provides for location in other zoning districts by special exception granted by the City Commission based upon specific findings. A ten year amortization period is provided for the abatement of existing nonconforming uses. The definition of adult theater encompasses the presentation of topless and nude dancers.

In October 1981, the City enacted Ordinance No. 81-334 which prohibited nude or semi-nude activity in establishments serving alcoholic beverages.

For some years prior to the enactment of the ordinances, petitioners owned and operated nightclubs in the City which served alcoholic beverages and featured topless dancers. None of their establishments was in a BA zoning district. Except for a six month period in 1983 when the Red Garter Club (one of petitioners' businesses) was involuntarily closed due to drug law violations, petitioners elected to continue serving alcohol in their establishments. Consequently, they voluntarily abandoned their nonconforming uses as adult theaters.

In late 1985 and early 1986, after the Florida Supreme Court had upheld Ordinance No. 81-334 against constitutional challenges, *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985), petitioners made some inquiries to the City concerning a desire to cease serving alcohol at their businesses and begin the presentation of nude entertainment. The City replied that the businesses were not in the proper zoning district for that use. None of the

petitioners requested a special exception under the waiver provisions of Ordinance No. 81-292.

In February 1986, petitioners filed a Complaint in the United States District Court for the Middle District of Florida seeking preliminary and permanent injunctions against the enforcement of Ordinance No. 81-292, and a declaration that the ordinance is unconstitutional. The court denied preliminary injunction in March 1986, in part on grounds that petitioners had failed to exhaust the administrative remedy of applying for an exception.

A bench trial was held in June 1987. At trial petitioners acknowledged they still had made no effort to apply for an exception. They did not present any evidence that they had attempted to locate anywhere in the City other than on the sites currently occupied by their bars. The only competent evidence[1] before the court as to opportunities for adult theaters to locate or relocate after amortization was that the ordinance, when applied by the City's zoning official to existing zoning and uses, provided twelve new sites within the City and that eight of these could be used concurrently.

Petitioners state there was "no dispute" at trial as to the vagueness of the ordinance. In support of this factual statement, petitioners quote extensively from the trial testimony of Fred Holmes, a City zoning official. Several

---

[1] Petitioners presented the testimony of a private investigator that, in his opinion, the twelve sites designated by the zoning official did not meet the criteria of the ordinance. The court rejected his opinion based on the witness's lack of expertise or knowledge in the application of the City's zoning ordinance.

pages are devoted to Mr. Holmes' testimony regarding the interpretation of "public or semi-public place o[f] assembly where large numbers of minors travel or congregate". In sum, he testified that he utilized a definition of this term contained in the Life Safety Code also adopted by the City, and that provision was included in the record.

With respect to the term *adult theater*, petitioners set forth the following excerpt from Mr. Holmes' testimony under cross-examination:

> Q. Would it matter to your office if the totally nude entertainment was not harmful to minors?
>
> A. I don't know what harmful to minors would be. I'm not an expert in that field.
>
> Q. In fact, Mr. Holmes, is it not your opinion that any exposure of the female breast is activity which is harmful to minors?
>
> A. No.
>
> Q. Is any exposure of the human female breast in connection with a stage performance adult entertainment?
>
> A. Yes.

Petitioners did not provide the Court with the remainder of that exchange, which continues:

> Q. And that in and of itself requires the business to be in a BA zone?
>
> A. Yes.
>
> Q. Regardless of how short a duration the exposure takes? Say five seconds?
>
> A. *If it's billed primarily as adult entertainment*, it would be considered – (emphasis supplied)

In order to fairly understand Mr. Holmes' testimony, the following should also be considered:

> (Still under cross-examination)
>
> Q. When you made determinations in the past as to whether a business was or was not an adult theater for purposes of this ordinance, did you do so based on that language [definition of adult theater contained in the ordinance]?
>
> A. You implied that I made them in the past and I haven't because no one has ever requested or told me what they intended to do.
>
> Q. Are you saying you have never had a formal application submitted?
>
> A. Never had a formal application submitted, yes, sir.

Counsel then questioned Mr. Holmes about his written response to a letter from the attorney for the Shingle Shack, one of petitioners' businesses. The letter requested licensing information for a business described as presenting "nonobscene constitutionally protected striptease and nude female dancers". Mr. Holmes had indicated that "adult theater zoning" was required:

> Q. And where did you get the – How did you make the decision that they weren't [permitted to operate in the zoning district]?
>
> A. Nude female dancers.
>
> Q. Okay. And that's all it took in your mind, is that correct?
>
> A. That's correct.
>
> Q. And it didn't make any difference to you if the nudity was harmful to minors, correct?

A. I don't have any idea what might be harmful to minors.

The ordinance defines adult theater as a use exhibiting "nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and is harmful to minors, *all as defined in 847.013, F.S.*, as may be amended, and admission of minors to which is unlawful in accordance with 847.013, F.S., as may be amended." (emphasis supplied) Section 847.013(1), *Fla. Stat.*, provides definitions of "nudity", "sexual conduct", "sexual excitement", and "sadomasochistic abuse" in paragraphs (a) through (e), and a defintion of "harmful to minors" in paragraph (f). Appendix B.

In their petition to this Court, petitioners make other claims which are entirely outside the trial record, flagrant distortions of fact, or outright lies. These claims are an undisguised effort to attack evidence as to the City's goals and commitment to redevelopment, which petitioners did not even attempt to refute at trial. After thoroughly examining the record, the City advises this Court that there is absolutely no record evidence or inference of any sort about the number of alcoholic beverage licenses in the City, about the Daytona International Speedway, Spring Break, or Bike Week. In particular, petitioners' claim that the City opens its arms to an annual gathering of "thousands of 'Hell's Angels' motorcyclists" is patently untrue.

There is a report in the record, which pre-dates the adoption of the ordinance, identifying twenty "sexually oriented" businesses existing in 1981. There is no evidence regarding how many of these actually were regulated by the ordinance, or exactly how many have closed.

The evidence was that several of them closed after RICO charges were filed by the State, and that *none of them closed by operation of the ordinance.* Numerous bars, including those of petitioners, which offer "exotic dancers" as entertainment and were among the twenty businesses listed, continue to operate within the City under the regulation of Ordinance No. 81-334 prohibiting nudity in bars.

After hearing the evidence, the District Court issued an unreported opinion finding the ordinance constitutional in all respects. The vagueness challenges were dismissed without comment, except in regard to petitioners' failure to exhaust administrative remedies. The decision was affirmed *per curiam* without opinion by the Court of Appeals for the Eleventh Circuit, citing 11th Circuit Rule 36-1 that an opinion would have no precedential value. *See,* Appendix A.

The ordinance was properly analyzed by the District Court as a time, place, and manner restriction under *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 106 S. Ct. 925, 89 L.Ed.2d 29 (1986). Such an ordinance is permissible where it serves a substantial governmental interest and does not unreasonably limit alternative avenues of communication. The trial court found that the ordinance currently provided twelve available sites for the location of adult businesses in the City. The trial court's findings of fact should not be disturbed unless clearly erroneous. *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

SUMMARY OF THE ARGUMENT

I. The standard which an adult business zoning ordinance must meet in order to pass constitutional muster is not whether it leaves the availability of sites "virtually unrestricted" as proposed by petitioners. *Renton* made it clear all that is required is that petitioners not be denied a reasonable opportunity to open and operate an adult theater.

The inquiry under *Renton* as to whether a particular limitation is unreasonable must be made in the context of the conditions which exist in the particular community. The challenged ordinance does have the effect of providing a limited number of sites for the location of adult theaters and bookstores within the City. However, the facts presented to and accepted by the court in this case showed that the City enacted the ordinance as one measure in a comprehensive redevelopment program calculated to combat blight prevalent in the community, and there was no indication that the twelve available new sites would not meet the demands of the community for access to such uses. In light of these facts, the twelve sites available to petitioners are not an unreasonable restriction of their First Amendment rights to present nude entertainment.

II. The ordinance is not vague as applied to these petitioners, and this is not an appropriate case in which to employ the overbreadth doctrine to allow them to litigate the rights of persons not before the court. Petitioners have not been affected by any of the terms which they allege are vague. They propose businesses clearly

within the ordinance's definition of adult theater at locations which are not in permitted zoning districts. They have not attempted to obtain a special exception, the provisions for which are virtually identical to those in the Detroit ordinance which this Court refused to strike down in *Young v. American Mini Theatres*.

Since there is no vagueness in the provisions of the ordinance as applied to these petitioners, they have no standing to raise the issue.

ARGUMENTS SUPPORTING DENIAL OF THE WRIT

I. THE FINDING THAT ORDINANCE NO. 81-292 DOES NOT UNCONSTITUTIONALLY RESTRICT PETITIONERS' FIRST AMENDMENT RIGHTS AND PROVIDES ADEQUATE AND REASONABLE LOCATIONS FOR THE EXPRESSION OF NUDE DANCING WITHIN THE CITY DOES NOT CONFLICT WITH ANY POST-*RENTON* DECISIONS.

This Court first upheld an adult business zoning ordinance in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), where it was determined that zoning ordinances designed to combat the undesirable secondary effects of sexually oriented businesses are to be reviewed as content-neutral time, place, and manner regulations. The test to be applied in analyzing such an ordinance, however, was clearly set out in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), ten years later. There it was held, first, the ordinance must serve a substantial

governmental interest, and second, it must allow for reasonable alternative avenues of communication. *Id.*, at 50, S.Ct. at 930. The Court further announced guidelines in determining the second prong of this test which had not been discussed in *American Mini Theatres. Renton,* at 53-54, S.Ct. at 932.

In attempting to establish conflict certiorari, petitioners cite numerous cases decided by the federal courts after *American Mini Theatres,* but prior to *Renton.* These earlier cases decided without the benefit of *Renton* are of no value in determining conflict.

The Fifth, Sixth, Ninth, and Eleventh Circuits have issued post-*Renton* opinions dealing with the reasonableness of alternative avenues of communication provided by adult business zoning ordinances. A review of these cases does not reveal any clear conflict with the decision which is the subject of this petition.

The District Court's Order upholding the City's ordinance was affirmed without opinion by the appellate court. The District Judge relied almost exclusively on *Renton* and an Eleventh Circuit case, *International Food & Beverage Systems v. Fort Lauderdale,* 794 F.2d 1520 (11th Cir. 1986). *International Food* involved an adult business zoning ordinance in Fort Lauderdale, Florida, a city of 156,000 inhabitants covering 31 square miles. The court found that the ordinance would allow as many as 22 sites and stated:

> We are at a loss how anyone could determine that as many as 22 sites for such bars were not enough, without reference to community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plan

> works towards. Justice Rehnquist does not say the city may not "limit alternative avenues of communication," but only that it may not limit them "unreasonably." What is reasonable cannot be ascertained by reference to nothing except the wishes of the nude bar proprietors.
>
> ********
>
> The ordinances here challenged should have been tested by reference to the entire zoning scheme of which they were meant to be a part, not as an isolated whim of the commissioners, ***

Id., at 1526, 1527. The Eleventh Circuit remanded the case to the trial court for reconsideration in light of *Renton*. It was eventually decided on other grounds. *International Food & Beverage Systems v. Fort Lauderdale*, 664 F.Supp. 482 (S.D.Fla. 1987).

The Ninth Circuit, in its first application of *Renton*, made a similar observation concerning the context in which an adult business zoning ordinance should be judged: "The availability of alternative sites must be considered in light of the ordinance's purpose and design". *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331, 1337 (9th Cir. 1986). It, too, ordered remand in light of *Renton*. The case made its way back to the appellate court in 1988, *Walnut Properties, Inc. v. Whittier*, 861 F.2d 1102 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 57 USLW 3653 (1989), and the Ninth Circuit found that the ordinance did deny Walnut a reasonable opportunity to operate its theater within the city.

Walnut invoived an ordinance similar to the City's. The ordinance was dealt with in terms of the number of

sites available for the location of the regulated businesses. While a definite number of sites was not established in the case, the court indicated there were "significantly" less than twelve and probably a range of two to four. *Id.*, at 1109. A second major concern of the court was its understanding that the Whittier ordinance would "force the only existing adult theater in Whittier to close at its present location with no definite prospect of a place to relocate." *Id.*, at 1110. That is not the situation in this case. First, petitioners do not operate adult theaters in the City.[2] They wish to convert their existing bars into

---

[2] Petitioners have at all times operated bars featuring female "exotic dancers" as entertainment. At the time the zoning ordinance was enacted in September 1981, the dancers were performing topless. The topless performances brought their establishments within the definition of *adult theater* in the ordinance. As long as they continued to operate as adult theaters, petitioners' businesses were entitled to remain at their nonconforming locations for the ten year amortization period.

In October 1981 Ordinance No. 81-334 was enacted. This ordinance prohibited nudity in establishments serving alcohol. After the enactment of this ordinance, petitioners chose to continue serving alcohol. By this choice, petitioners abandoned the use of adult theater as defined in the ordinance (or, as petitioners prefer to call it, "adult nightclub"). The zoning ordinance provides that a nonconforming use cannot be reestablished as a matter of right after abandonment for nine months.

If petitioners had chosen, either in October 1981 or any time during the following nine months, to cease serving alcohol and to present nude or topless dancers, they would have been entitled to continue under the amortization provision.

adult theaters. Second, the City's ordinance provides a 10 year amortization period during which any affected establishment may arrange for relocation or waiver. Third, there are currently twelve available sites within the City which would accomodate the proposed use as compared to between two and four in Whittier. Petitioners did not establish any impediment to the location of their proposed businesses on the available sites, only that they wished to establish them at the sites of their existing bars. And finally, the Whittier ordinance was not supported by the kind of evidence offered by the City here regarding its extensive redevelopment project.

The Sixth Circuit case, *Christy v. City of Ann Arbor*, 824 F.2d 489 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1013, 98 L.Ed.2d 978 (1988), was also remanded. The trial court had relied primarily on the ordinance's application only to businesses with more than 20 percent adult wares in holding that the ordinance was "not greatly restrictive of first amendment rights". *Id.*, at 492. The Sixth Circuit directed the District Court to determine whether the ordinance "severely" restricted expression in terms of the locations available for strictly adult bookstores. *Id.*

The Fifth Circuit has heard two cases raising, *inter alia*, the issue of whether reasonable alternative avenues of communication exist: *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); and *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). In both cases the court found the available sites sufficient to meet *Renton* requirements. The court indicated Houston's ordinance would allow " 'at least 100' and perhaps up to 'tens of

thousands' " of sites in the city. 837 F.2d 1277. The opinion in *FW/PBS* does not specify the number of locations available, only that the ordinance "allows reasonable alternative avenues of communication." 837 F.2d 1303. Petitions for certiorari were filed in both cases on this and other issues. This Court granted jurisdiction in *FW/PBS* only in regard to those issues involving licensing requirements, ___ U.S. ___, 109 S.Ct. 1309 (1989), and denied the petition in *SDJ, sub. nom. M.E.F. Enterprises, Inc. v. City of Houston,* ___ U.S. ___, 109 S.Ct. 1310 (1989).

Upon a review of current reported opinions, it is evident that the District Court's unreported Order in this case, affirmed *per curiam* without opinion by the Eleventh Circuit Court of Appeals, is entirely in accordance with *Renton* and later rendered opinions of the Circuit Courts.

II. THE PROVISIONS OF THE CHALLENGED ORDINANCE ARE SUFFICIENTLY CLEAR AND UNAMBIGUOUS TO MEET CONSTITUTIONAL REQUIREMENTS.

Petitioners attack the terms *adult theater* and *any other public or semi-public place o[f] assembly where large numbers of minors regularly travel or congregate* as being so vague that they render the ordinance unconstitutional.

The definition of *adult theater* in the ordinance incorporates §847.013, *Fla. Stat.*, Appendix B, and provides that it is a use to which admission of minors is unlawful under that state statute. All terms used are specifically defined in §847.013(1). The constitutionality of §847.013 was upheld in *Davison v. State,* 288 So.2d 483 (Fla. 1973),

appeal denied, 415 U.S. 943, 94 S.Ct. 1463, 39 L.Ed.2d 560 (1974).

In support of their contention that *adult theater* is a vague term, petitioners rely on the testimony of Fred Holmes. As set forth in the preceding statement of the case, Mr. Holmes' testimony shows that he never had the opportunity to apply the definition of *adult theater* except in response to an informal request concerning "striptease and nude female dancers". Clearly that description came within the definition. If and when Mr. Holmes is required to make this determination in a less clear case, and not under the pressure of cross-examination, he would be able to avail himself of the normal resources of the City, including legal counsel.

Mr. Holmes testified that he used a definition contained in the City's Life Safety Code to determine the application of the term *any other public or semi-public place of[] assembly where large numbers of minors regularly travel or congregate*. In essence, this language is a trade term with a universally accepted meaning. *See, e.g.*, §§301.1(1), 302.1, *The BOCA National Building Code 1987*, 10th Edition, Building Officials & Code Administrators International, Inc.; §8-1.3, *Life Safety Code*, 1988 Edition, National Fire Protection Association, Inc.; §404.1.2, *Standard Building Code*, 1988 Edition, Southern Building Code Congress International, Inc.; §402, *Uniform Building Code*, 1988 Edition, International Conference of Building Officials; Appendix C-F. Mr. Holmes' interpretation is entirely consistent with the nationally accepted standard in regard to consideration of the building usage and the number of persons being 50. In any event, petitioners' complaint is

that they have not been permitted to establish adult theaters in their current business locations. The reason they cannot do so is that none of these locations is in a BA zoning district. The distance restriction concerning travel or congregation of minors has not been applied to petitioners – they are simply in the wrong districts.

The Supreme Court relegated vagueness challenges raised in *Renton* to a footnote:

> We reject respondents' "vagueness" argument for the same reasons that led us to reject a similar challenge in *American Mini Theatres, supra*. There, the Detroit ordinance applied to theaters "used to present material distinguished or characterized by an emphasis on [sexually explicit matter]." 427 U.S., at 53, 96 S.Ct., at 2444. We held that "even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents." *Id.*, at 58-59, 96 S.Ct., at 2446. We also held that the Detroit ordinance created no "significant deterrent effect" that might justify invocation of the First Amendment "overbreadth" doctrine. *Id.*, at 59-61, 96 S.Ct., at 2446-2448.

Renton, 475 U.S. at 55 n.4, 106 S.Ct. at 933.

Petitioners also describe the standards for the City Commission's granting of a special exception as "blatantly unconstitutional", and cite in support cases which deal with the constitutionality of subjecting first amendment activities to a prior restraint. This is not a prior restraint situation.

Petitioners need not meet the criteria of the special exception in order to exercise their first amendment rights to present nude dancing. They may locate their proposed businesses as a matter of right in any one of the

twelve locations found available by the trial court. There is no prior restraint on the expression of nude dancing in the City. It is only if petitioners wish to locate such a business outside of an appropriately zoned area, or contrary to the locational restrictions, that the waiver criteria come into play. The City Commission authorized itself to grant special exceptions in the case of adult theaters as a means of providing additional opportunities for their establishment. The criteria for granting a special exception include required findings that the public interest and the spirit and intent of the ordinance be observed. §§ 51.3 and 51.1, Ordinance No. 81-292, Petitioners' App. A-3,4,5. These are the kind of criteria generally held sufficient to sustain the validity of a special exception provision. Annotation, *Zoning – Delegation of Authority*, 58 A.L.R.2d 1083.

Similar vagueness issues were raised in *Young v. American Mini Theatres, Inc.*: (1) that it could not be determined from the definition how much presentation of sexual activity or exposure would subject a business to the zoning restriction, and (2) that the provisions for obtaining a waiver of the 1,000-foot restriction did not specify adequate procedures or standards. The findings required in the Detroit ordinance before a waiver could be granted were virtually identical to the special exception criteria in the City's ordinance. As is the case here, no attempt had been made to utilize the waiver provision. The Court held:

> We find it unnecessary to consider the validity of either of these arguments in the abstract. For even if there may be some uncertainty about the effect of the ordinances on other litigants, they are unquestionably applicable to these respondents. The record

> indicates that both theaters propose to offer adult fare on a regular basis. Neither respondent has alleged any basis for claiming or anticipating any waiver of the restriction as applied to its theater. It is clear, therefore, that any element of vagueness in these ordinances has not affected these respondents. To the extent that their challenge is predicated on inadequate notice resulting in the denial of procedural due process under the Fourteenth Amendment, it must be rejected. (footnote ommitted)

Id., at 58-59, S.Ct. at 2446-2447.

In rejecting the respondents' argument that they had standing to raise the vagueness issue under the first amendment overbreadth doctrine, the Court said:

> For most films the question [whether they are subject to the ordinance] will be readily answerable; to the extent that an area of doubt exists, we see no reason why the ordinances are not "readily subject to a narrowing construction by the state courts." Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinances is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

Id., at 61, S.Ct. at 2448.

The terms contained in the City's ordinance are sufficiently clear to meet constitutional standards. Furthermore, since petitioners here have not been affected by any alleged vagueness in the City's zoning ordinance, and the alleged vagueness is readily susceptible to a

narrowing construction by the state courts, this argument must be rejected.

CONCLUSION

The rulings below are squarely based on *Renton*, and do not conflict with any decisions of this Court or the Circuit Courts of Appeals.

Respectfully submitted,

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APPENDIX A

11th Cir.R. 36-1 Affirmance
Without Opinion

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without an error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

* * *

[I.O.P–Opinions.

* * *

3. *Publication of Opinions.*

* * *

Opinions that the panel believes to have no precedential value are not published. All non-published opinions and affirmances without opinion under 11th Cir.R. 36-1 are printed in table form in the Federal Reporter. (See for example 791 F.2d 170). Although unpublished opinions may be cited-as precedent, this is looked upon

with disfavor by the Court. If cited, a copy should be attached to or incorporated within the motion, brief or petition in which such citation is made.

APPENDIX B

§847.013, *Florida Statutes* (1985)

847.013 Exposing minors to harmful motion pictures, exhibitions, shows, presentations, or representations.–

(1) DEFINITIONS.–As used in this section:

(a) "Minor" means any person under the age of 18 years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a full opaque covering; the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation; homosexuality; sexual intercourse; physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast or any act or conduct which constitutes the commission of the abominable and detestable crime against nature or suggests that such crime is being or will be committed.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask, or bizarre costume or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description, exhibition, presentation, or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:

1. Predominantly appeals to the prurient, shameful, or morbid interest of minors,

2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors, and

3. Is without serious literary, artistic, political, or scientific value for minors.

* * *

(2) OFFENSES AND PENALTIES.–

(a) It is unlawful for any person knowingly to exhibit for a monetary consideration to a minor or knowingly sell to a minor an admission ticket or pass or knowingly admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, or sadomasochistic abuse and which is harmful to minors.

APPENDIX C

§§301.1(1), 302.1, *BOCA National Building Code 1987*, 10th Edition, Building Officials & Code Administrators International, Inc.

SECTION 301.0 CLASSIFICATION

301.1 General: All buildings and structures shall be classified with respect to use in one of the use groups listed below.

1. Use Group A assembly (see Section 302.0).
2. Use Group B business (see Section 303.0).
3. Use Group E educational (see Section 304.0).
4. Use Group F factory and industrial (see Section 305.0).
5. Use Group H high hazard (see Section 306.0).
6. Use Group I institutional (see Section 307.0).
7. Use Group M mercantile (see Section 308.0).
8. Use Group R residential (see Section 309.0).
9. Use Group S storage (see Section 310.0).
10. Use Group U utility and miscellaneous (see Section 311.0).

SECTION 302.0 USE GROUP A, ASSEMBLY USES

302.1 General: All buildings and structures, or parts thereof, shall be classified in Use Group A which are used or designed for the gathering together of persons for

purposes such as civic, social or religious functions, recreation, food or drink consumption or awaiting transportation. A room or space used for assembly purposes by less than 50 persons and which is accessory to another use group shall be included as a part of that main use group.

APPENDIX D

§8-1.3, *Life Safety Code*, 1988 Edition, National Fire Protection Association, Inc.

8-1.3 Special Definitions.

Assembly Occupancies. Include, but are not limited to, all buildings or portions of buildings used for gathering together 50 or more persons for such purposes as deliberation, worship, entertainment, dining, amusement, or awaiting transportation.

APPENDIX E·

§404.1.2, *Standard Building Code*, 1988 Edition, Southern Building Code Congress International, Inc.

404 ASSEMBLY OCCUPANCY – GROUP A

404.1 Scope

404.1.1 Group A occupancy is the use of a building or structure, or any portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions or for recreation, or for food or drink consumption or awaiting transportation.

404.1.2 Group A occupancy shall include, among others, the following:

Amusement Park Buildings
Auditoriums
Churches
Dance Halls
Gymnasiums
Restaurants that accommodate 50 or more people, or provide dancing or entertainment
Motion Picture Theaters
Museums
Passenger Depots
Public Assembly Halls
Recreation Halls
Stadiums and Grandstands
Tents for Assembly
Theaters for Stage Production

APPENDIX F

§402, *Uniform Building Code*, 1988 Edition, International Conference of Building Officials

* * *

ASSEMBLY BUILDING is a building or portion of a building used for the gathering together of 50 or more persons for such purposes as deliberation, education, instruction, worship, entertainment, amusement, drinking or dining or awaiting transportation.

* * *